

Depasquale v Staten Is. Univ. Hosp.

2021 NY Slip Op 31919(U)

February 1, 2021

Supreme Court, Richmond County

Docket Number: 151010/2015

Judge: Judith N. McMahon

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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND**

IAS PART 6

ESTELLE DEPASQUALE and NOELLE CARBONE as
Administrator of the Estate of JOSEPH DEPASQUALE,

ORDER

Plaintiffs,

- against -

Index Number: 151010/2015
Motion Sequence #009
Hon. Justice
Judith N. McMahon

STATEN ISLAND UNIVERSITY HOSPITAL,
NORTH SHORE LIJ NETWORK, INC., DANIEL MEGNA,
M.D., SOTTILE & MEGNA, M.D., P.C., CORNELIU VULPE,
M.D., SHAILRAJ PARIKH, M.D., JOHN/JANE DOE, M.D.
AND JOHN/JANE DOE, R.N.,

Defendants.

Defendant Corneliu Vulpe, M.D.s' ("VULPE") Order to Show Cause (motion sequence 009) seeking permission for VULPE to file a late notice of appeal and deeming the Notice of Appeal annexed thereto served *nunc pro tunc* is granted as detailed herein.

In this action, Plaintiff alleges that Estelle DePasquale's duodenum was perforated during either an endoscopic retrograde cholangiopancreatography (ERCP) performed by Defendant Gastroenterologist Daniel Megna on December 29, 2014, or during a cholecystectomy performed by Defendant General Surgeon VULPE on December 30, 2014. Plaintiff has not alleged malpractice related to the performance of the ERCP procedure, and consequently Plaintiff has discontinued against Defendant Dr. Megna and his professional practice. Plaintiff's alleged malpractice concerns the post-operative care of Estelle DePasquale.

On July 27, 2020, this Court granted summary judgment motions filed by Defendant Staten Island University Hospital and Defendant Dr. Shailraj Parikh, but denied the summary judgment motion filed by VULPE.

On August 17, 2020, VULPE efiled a "Notice of Appeal/Informational Statement/Copy of Order/Proof of Service" (efile document #19). The efiled document purported to appeal the denial of

VULPE's summary judgment motion and described, in detail, the basis of VULPE's intent to appeal.

However, the efiled document did not contain the notice of appeal cover page.

VULPE now seeks to cure that deficiency.

"An appeal shall be taken by serving on the adverse party a notice of appeal and filing it in the office where the judgment or order of the court of original instance is entered...A notice shall designate the party taking the appeal, the judgment or order or specific part of the judgment or order appealed from and the court to which the appeal is taken." *NY CPLR 5515*.

VULPE complied with the second sentence, clearly indicating an intent to appeal, the party taking the appeal, the order and specific part of the order appealed from, but failed to file the notice of appeal cover page required for a notice of appeal.

"Omissions: If an appellant either serves or files a timely notice of appeal or notice of motion for permission to appeal, but neglects through mistake or excusable neglect to do another required act within the time limited, the court from or to which the appeal is taken or the court of original instance may grant an extension of time for curing the omission." *NY CPLR 5520(a)*.

As this case is an efiled case, the service and filing of the notice of appeal that had traditionally been a two step process, can now be accomplished by a single efilings, which was done here.

The document efiled by VULPE certainly gave notice to all parties of their intent to appeal.

"An appeal shall be taken by serving on the adverse party a notice of appeal and filing it in the office where the judgment or order of the court of original instance is entered. To properly bring an appeal, petitioner was required to complete both steps by timely filing a notice of appeal in the proper court and by serving it on respondent. Where only one of these steps is properly completed, the court has the discretion to grant an extension of time for curing the omission. Notably, however, a complete failure to comply with CPLR 5515 deprives this Court of jurisdiction to entertain the appeal." *Cnty. Hous. Improvement Program v. Comm'r of Labor*, 166 A.D.3d 1135, 88 N.Y.S.3d 254 (N.Y.A.D. 3rd Dept. 2018). This Court finds that VULPE's efiled document is not a situation that can be described as a complete failure to comply with CPLR

5515. Certainly all parties were on notice of the intent to take an appeal and the discrete issue that is the subject of the appeal.

As indicated in VULPE's moving papers, the defect in the present case was discovered by VULPE. In other cases where notices of appeal were rejected because of a defect discovered by the Court, it has been found that "this appeal was timely filed, despite the fact that the initial notice of appeal was returned by the Clerk due to an error and was not refiled until more than 30 days later. The initial filing was sufficient for jurisdictional purposes, and the correction was not consequential. Moreover, plaintiffs filed their pre-argument statement and the orders that are the subject of the appeal at the same time as the initial notice of appeal, thus providing defendant with notice." *Perlbinder v. Bd. of Managers of 411 E. 53rd St. Condo.*, 154 A.D.3d 467, 62 N.Y.S.3d 110 (N.Y.A.D. 1st Dept. 2017). The defect VULPE seeks to correct in this case is certainly not consequential, as it does not contain any new information not already efiled by VULPE, and is merely an introductory page for the substantive documents that have already been efiled. As stated above, the documents efiled by VULPE certainly gave notice to all parties of their intent.

"It appears that the defendant's omission to file the notice of appeal was inadvertent and excusable; hence, such omission may be cured. The failure to serve [necessary parties in the case] is a defect which is also remediable upon a showing of inadvertence. *Gamble v. Gamble*, 23 A.D.2d 887, 259 N.Y.S.2d 910 (N.Y.A.D. 2nd Dept. 1965).

This Court finds the defect in VULPE's efiled Notice of Appeal/Informational Statement/Copy of Order/Proof of Service to be inadvertent and excusable, and therefore grants VULPE's Order to Show Cause seeking permission for VULPE to file a late notice of appeal and deeming the Notice of Appeal annexed thereto served *nunc pro tunc*.

Accordingly, it is

ORDERED that VULPE's Order to Show Cause seeking permission for VULPE to file a late notice of appeal and deeming the Notice of Appeal annexed thereto served *nunc pro tunc* is granted, and it is further

ORDERED that the Notice of Appeal annexed to VULPE's Order to Show Cause is deemed served timely; and it is further

ORDERED that the Clerk of the Court is directed to accept the Notice of Appeal annexed to the Order to Show Cause as served timely; and it is further

ORDERED that any and all additional requests for relief are hereby denied, and it is further,

ORDERED that the Clerk enter Judgment accordingly.

THIS IS THE DECISION AND ORDER OF THE COURT.

Dated: February 1, 2021

So Ordered.

/s/ Judith N. McMahon

ENTER: _____

Hon. Judith N. McMahon, J.S.C.